84-1700

Supreme Court, U.S.
FILED
APR 29 1985
ALEXANDER L. STEVAS
CLERK

No. _____

IN THE SUPREME COURT OF THE ~~UNITED STATES~~

October Term, 1984

JEROME OTTO LILL, Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SARAH FUREY CRANDALL
of Counsel to
FRITSCHLER, PELLINO, SCHRANK & ROSEN, S.C.
131 W. Wilson Street, Suite 601
Madison, WI 53703
Telephone: (608) 255-4501

On behalf of Petitioner
Jerome Otto Lill

83 pp

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

JEROME OTTO LILL, Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SARAH FUREY CRANDALL
of Counsel to
FRITSCHLER, PELLINO, SCHRANK & ROSEN, S.C.
131 W. Wilson Street, Suite 601
Madison, WI 53703
Telephone: (608) 255-4501

On behalf of Petitioner
Jerome Otto Lill

QUESTION PRESENTED

Whether the court of appeals erred in dismissing only one count of a multi-count indictment when the court of appeals held that the tandem presentation of the testimony of two material witnesses before the grand jury violated F.R.Cr.Pro. 6(d), and that violations of Rule 6(d) require the dismissal of an indictment.

PARTIES TO THE PROCEEDING

In addition to the parties shown in the caption, Marshall Mechanik, Shahbaz Shane Zarintash, Steven Henry Riddle and Mark Douglas Chadwick were appellants below.

TABLE OF CONTENTS

Opinions Below.....1

Jurisdiction.....1

Rules Involved.....2

Statement of the Case.....2

Reasons for Granting the Petition...11

Conclusion.....21

Appendix A.....1a

Appendix B.....14a

Appendix C.....26a

Appendix D.....54a

TABLE OF AUTHORITIES

Cases:

Latham v. United States,
226 F. 420 (5th Cir. 1915).....13

United States v. Birdman,
602 F.2d 547, 557,
558-560 (3rd. Cir. 1979).....19

United States v. Borys,
169 F. Supp. 366
(D. Alaska 1959).....13

Unites States v. Bowdach,
324 F. Supp. 123
(S.D. Fla 1971).....13

United States v. Branniff Airways, Inc., 428 F. Supp. 578 (W.D. Tex 1977).....13

United States v. Echols, 542 F.2d 948 (5th Cir. 1976) cert. denied, 431 U.S. 904 (1977).....13

United States v. Edgerton, 80 F. 374 (D. Mont. 1877).....14

United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979).....13

United States v. Johnson, 319 U.S. 503, 507 (1943).....14

United States v. Kazonis, 391 F. Supp. 804 (D. Mass. 1975).....16

United States v. Phillips Petroleum Co., 435 F. Supp. 610 (N.D. Okl. 1977).....13

United States v. Treadway, 445 F. Supp. 959 (N.D. Tex. 1978).....13, 15

Statutes and Rules:

Jencks Act, 18 U.S.C. 3500.....6
18 U.S.C. 2.....3
18 U.S.C. 841.....2
21 U.S.C. 841.....3
21 U.S.C. 952.....2
Fed.R.Crim.Pro.:
Rule 6(d).....passim

NO. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1984

JEROME OTTO LILL, PETITIONER

vs.

UNITES STATES OF AMERICA

The petitioner, Jerome Otto Lill, petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The per curiam opinion of the Court of Appeals on rehearing en banc (App., infra 1a-3a) is not yet reported. The panel opinion (App., infra 14a-25a) is reported at 735 F.2d 136. The opinion of the district court (App., infra, 25A-53a) is reported at 511 F.Supp. 50.

JURISDICTION

The judgment of the en banc Court

was entered on March 1, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

RULES INVOLVED

Federal Rule of Criminal Procedure 6(d) provides:

> Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

STATEMENT OF THE CASE

Following prosecution and trial on an indictment returned by a Federal grand jury on August 10, 1979, the petitioner, Jerome Otto Lill, was convicted of conspiracy in violation of 18 U.S.C. §841 (Count One), importation of marijuana in violation of 21 U.S.C. 952 (Count Two), and possession of marijuana

with intent to distribute in violation of 18 U.S.C. §2 and 21 U.S.C. 841 (Count Four). Petitioner Lill was sentenced to five years' imprisonment on the conspiracy conviction, to run concurrently with terms of two years' special parole on each of the other two convictions, plus a total fine of ten thousand dollars.

The Court of Appeals reversed the petitioner's conviction on the conspiracy count, and affirmed his convictions on the substantive counts of importation and possession of marijuana. (App., infra, 4a).

On June 6, 1979, an airplane crash landed at the Kanawha County Airport, Charleston, West Virginia. Authorities investigating the crash discovered that the airplane was loaded with large quantities of marijuana. Seven hours after the crash-landing, the petitioner was apprehended while walking along a highway some distance from the airport.

On June 14, 1979, a Federal grand jury returned an indictment which consisted of one conspiracy count and seven substantive counts, and named nine defendants including the petitioner (App., infra, 28(a)). Despite the return of the June 14, 1979, indictment, on July 31, August 2, 9 and 10, the same grand jury received further testimony relating to the incident. (App., infra, 29(a)). On August 10, 1979, Drug Enforcement Administration Agents James and Rhinehart were placed under oath, and simultaneously testified before the grand jury (App., infra, 29a).

Agent James was Agent Rhinehart's superior officer, and both agents were in command of the entire investigation of the airplane crash. (App., infra, 41a). On the same day the agents gave simultaneous and material testimony, August 10, 1979, the grand jury returned

a superceding indictment which consisted of one conspiracy count and eleven substantive counts, and named twelve defendants, including the petitioner.

Prior to the trial on the August 10, 1979, indictment, the petitioner joined in a co-defendant's request for a list of grand jury witnesses, asserting the possibility of a Rule 6(d) violation as a basis for that request (App., infra 26a, 27a). Additionally, the petitioner moved to dismiss the indictment alleging grand jury impropriety. The government denied the existence of any impropriety before the grand jury at that time, and persisted in such denial through the trial. The district court denied the pretrial request for a list of witnesses, denied the pretrial motion to dismiss the indictment, and the trial commenced.

During the second week of trial when the prosecution gave the petitioner a partial transcript of Agent Rhinehart's grand jury testimony, pursuant to the Jenck's Act, 18 U.S.C., §3500, the petitioner discovered the violation of Rule 6(d). The petitioner's motion to dismiss the indictment was denied by an order entered by the district judge on March 14, 1980, and the trial continued. (App., infra, 27a). The petitioner moved for a rehearing of the motion to dismiss the indictment on May 22. The district judge took the motion under advisement, and the trial continued.

On August 15, 1980, more than thirty days after the jury returned their verdict convicting the petitioner of three counts included in the August 10, 1979, indictment, the district court denied the motion to dismiss that indictment.

The district court found that the simultaneous appearance and testimony of the Drug Enforcement Administrative agents before the grand jury violated Rule 6(d) (App., infra, 33a-38a). The district court noted that federal decisions which had addressed Rule 6(d) violations uniformly adhered to the position that the presence of an unauthorized person before a grand jury was per se prejudicial and required dismissal of the indictment. (App., infra, 43a-45a).

Unwilling to apply the per se rule the district court endeavored to distinguish this case from the legion of cases mandating dismissal of the indictment without a requirement that prejudice be demonstrated, on the basis that the 6(d) rule violation occurred only in connection with the August 10 superceding indictment under which the petitioner was

tried, holding that the first indictment was uninfected by the 6(d) violation (App., infra, 45a). To achieve that end, the district court compared the two indictments, recounted the evidence presented to the grand jury supporting changes in both the original and the superceding indictments as well as the voting and attendance records of the grand jurors, analyzed the tainted grand jury testimony of Drug Enforcement Administrative agents, and redacted and disregarded portions of the superceding indictment relating to the agent's grand jury testimony on the basis of events that occurred at the trial. (App., infra, 49a-51a)

Following this exhaustive and meticulous process, the district court noted that dismissal might have been proper if the court had faced this issue before the trial. (App., infra, 51a).

However, the district court concluded that in the absence of prejudice to the defendant, dismissal was not required (ibid.).

A panel of the court of appeals reversed the petitioner's conspiracy conviction (App., infra, 14a-22a). Without hesitation, the court found that the simultaneous testimony of the two agents violated Rule 6(d) (App., infra, 18a). The Court specifically rejected the government's argument that a defendant must show prejudice before an indictment may be dismissed. The court stated that its holding was consistent with a recent case in the same circuit, and that most federal courts considering the matter have agreed that a showing of prejudice is not necessary to dismiss an indictment because of a Rule 6(d) violation. (App., infra, 18a-19a).

Despite holding that an indictment must be dismissed, without a showing of prejudice, to remedy a Rule 6(d) violation, the panel affirmed the petitioner's convictions on counts two and four of the indictment. The court stated that the per se rule of invalidity, appropriate to result in the dismissal of one count of the indictment, was inappropriate for the other counts because the substantive counts in the superceding indictment were identical to substantive counts returned in the original indictment, and the grand jury had a valid basis for the substantive charges independent of the unauthorized joint appearance of the agent-witness. (App., infra, 21a).

On the government's motion, the full court ordered rehearing en banc. (App., infra, 54a-55a). The en banc court voted to reverse the conspiracy

conviction for the same reasons stated by the panel (App., infra, 2a). The en banc court affirmed the petitioner's convictions on the two substantive counts for the same reasons stated by the panel (ibid). Two judges dissented from the en banc affirmance of the petitioner's convictions on the two substantive counts, stating that these counts should be dismissed for the same reasons that the conspiracy conviction was dismissed (ibid).

REASONS FOR GRANTING THE PETITION

Both lower courts held that the presentation of the simultaneous testimony of witnesses before the grand jury that returned the indictment resulting in the petitioner's convictions in this case was a clear cut violation of the Federal Rule of Criminal Procedure 6(d). Both lower courts recognized the overwhelming authority that a violation

of Rule 6(d) must result in a dismissal of the indictment without requiring that the petitioner demonstrate prejudice.

Although, under the court of appeals analysis of the case precedent in the fourth circuit and all other circuits the petitioner need not demonstrate prejudice, the petitioner's convictions on two of three charges contained in the indictment were affirmed because the petitioner was unable to demonstrate how he was prejudiced as to those counts by the Rule 6(d) violation. The rule applied by the fourth circuit to two counts of the indictment was inconsistent with the rule applied to another count of the same indictment, and was similarly inconsistent with the law as uniformly applied in other circuits. This petition should be granted because the internal inconsistency of the court of

appeals decision must be resolved, in that the requirement imposed regarding two of three counts of the indictment that the petitioner demonstrate prejudice, renders the decision in conflict with the decision in other federal courts on the same issue. Latham v. United States, 226 F. 420 (5th Cir. 1915); United States v. Echols, 542 F.2d 948 (5th Cir. 1976), cert. denied, 431 U.S. 904 (1977); United States v. Phillips Petroleum Co., 435 F. Supp. 610 (N.D. Okl. 1977); United States v. Borys, 169 F. Supp. 366 (D. Alaska 1959); United States v. Treadway, 445 F. Supp. 959 (N.D. Tex. 1978); Unites States v. Branniff Airways, Inc., 428 F. Supp. 578 (W.D. Tex 1977); United States v. Bowdach, 324 F. Supp. 123 (S.D. Fla. 1971); United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979); United States v. Edgerton, 80 F. 374 (D. Mont. 1877).

The importance of strict adherence to grand jury procedure, long recognized, was best stated by Justice Frankfurter in United States v. Johnson, 319 U.S. 503, 507 (1943):

> "Inasmuch as the initiation of prosecution through grand juries forms a vital feature of the Federal system of criminal justice, the law governing its procedures and the appropriate considerations for determining the legality of its actions are matters of first importance."

The justifications for not requiring prejudice in the face of a 6(d) violation, recognized by the court of appeals in dismissing count one, were equally applicable to all counts of the tainted indictment. As is evidenced by the district court's meticulous examination of the entire record, including the events occurring at trial, any attempt to establish what prejudice resulted from the 6(d) violation imposes a diffi-

cult burden on the court that outweighs the benefits to be derived from such an analysis. United States v. Treadway, 445 F. Supp. 959 (N.D. Tex. 1978).

On the same day the Rule 6(d) violation occurred, the grand jury returned the indictment. To justify the inconsistent holding in this case, the court of appeals improperly delved into the nature of the evidence considered by the grand jury, to find that there was a valid basis for the affirmed charges, independent of the joint appearance of the agents (App., infra, 21a).

The greatest danger of a 6(d) violation is that the presence of unauthorized witnesses creates the risk of undue influence or intimidation of the grand jurors. United States v. Kazonis, 391 F. Supp. 804 (D. Mass. 1975). Even if it were generally appropriate or feasible to judicially compartmentalize

the evidence upon which the grand jury found probable cause to return the second indictment, such a task was impossible in this case due to the nature and interrelationship of counts one, two and four.

Each charge involved a time period specifically including June 6, 1979. The gist of count one was that the petitioner conspired with others to possess marijuana with intent to deliver. It was charged that part of that conspiracy involved the petitioner's importation of the marijuana. The other counts charged the petitioner with both importing and possessing marijuana. Even if the court were correct that the tainted grand jury testimony related to count one, count one incorporated the elements of the other offenses.

Due to the nature of the charges, it is impossible to determine what

effect the Rule 6(d) violation had on the grand juries' deliberations as to any count of the indictment. The difficulty in making that asessment, in the face of such a flagrant 6(d) violation, provides the justification set forth in the above-cited cases for not requiring a demonstration of prejudice and mandates the dismissal of the entire indictment.

The petitioner was not brought to trial and was not convicted based upon the original indictment. The government chose to prosecute the petitioner on the tainted second indictment rather then the properly presented original indictment. The petitioner had the Fifth Amendment constitutional right to be prosecuted by indictment, and such right incorporates the notion that the actual charging document, and not some earlier indictment, adequately inform the accused of charges brought against him.

Just as the government chose to prosecute the petitioner on the tainted indictment, the government chose to conceal the taint. Before trial the petitioner requested inquiry to determine the existence of prosecutorial impropriety before the grand jury. The government resisted, denied the existence of impropriety, and the request was denied. Before the trial the petitioner moved to dismiss the charges based upon grand jury impropriety. The government resisted, denied the existence of any grand jury impropriety, and the petitioner's motion was denied. Had the district court faced this issue squarely before the trial, the motion to dismiss the indictment would have been granted. (App., infra, 51a). Any attempt to bring the issue squarely before the court prior to trial was thwarted by the government's inaccurate

denial of the existence of any grand jury impropriety.

In United States v. Birdman, 602 F.2d 547, 557, 558-560 (3rd Cir. 1979) the court stated that utilization of the per se rule of dismissal may also fulfill, in a given case, the public policy of assuring fairness in the process of justice, a policy which underlies the supervisory powers of the federal courts. The ethical violation of the government's attorney appearing as a grand jury witness and prosecutor in Birdman was held not to be a violation of Rule 6(d). However, the Birdman court recognized the per se rule applicable to actual 6(d) violations.

That the lower courts were forced to confront the issue of the appropriate remedy for the 6(d) violation in this case after trial was only because of the government's untenable position through

the pretrial proceedings that no 6(d) violation had occurred. The government played fast and loose with the grand jury, the petitioner and the district court. The complicated, lengthy, and costly trial was predicated upon an indictment which was returned following the most flagrant violation of Rule 6(d).

Reference to an earlier valid indictment is not a sufficient basis to dismiss one count and sustain convictions on the others. The original indictment was not the vehicle in which the government drove the petitioner to conviction. The courts should not endorse the reprehensible conduct of the government in concealing the existence of a flagrant rule violation from the district court, until such time as the government is forced to disclose it by the operation of another rule (the Jencks Act).

If allowed to stand, the decision of the court of appeals creates an internally inconsistent rule, and a rule inconsistent with the other federal circuits. Finally, the government's prosecutors will be rewarded for abusing the judicial process by denying the existence of a flagrant rule violation, which actually tainted the integrity of the grand jury process.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JEROME OTTO LILL,
Petitioner

By

Sarah Furey Crandall
of counsel to
Fritschler, Pellino,
Schrank & Rosen, S.C.
131 W. Wilson, Suite 601
Madison, WI 53703
(608) 255-4501
Attorney for Petitioner

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-5166

UNITED STATES OF AMERICA, APPELLEE

v.

MARSHALL MECHANIK,
a/k/a MICHAEL PATRICK FLANAGAN, APPELLANT

No. 80-5167

UNITED STATES OF AMERICA, APPELLEE

v.

SHAHBAZ SHANE ZARINTASH, APPELLANT

No. 80-5168

UNITED STATES OF AMERICA, APPELLEE

v.

JEROME OTTO LILL,
STEVEN HENRY RIDDLE, APPELLANTS

No. 80-5169

UNITED STATES OF AMERICA, APPELLEE

v.

MARK DOUGLAS CHADWICK, APPELLANT

Appeals from the United States District Court for the Southern District of West Virginia, at Charleston. John T. Copenhaver, District Judge. (CR 79-20056-11; 79-20045-07; 79-20056-09; 79-20045-06; 79-20056; 79-20045; 79-20056-04; 79-20045-05)

Argued: December 5, 1984 Decided: March 1, 1985

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN, CHAPMAN, WILKINSON and SNEEDEN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

PER CURIAM:

I

For reasons stated in the majority opinion of the panel, United States v. Mechanik, 735 F.2d 136 (4th Cir. 1984), the judgments convicting Mechanik, Zarintash, Lill, and Riddle on count 1 of the indictment are reversed.

Dissenting, Judge Russell, Judge Hall, Judge Chapman, Judge Wilkinson, and Judge Sneeden would affirm for the reasons stated in the dissent to the panel opinion, 735 F.2d at 141.

II

The judgments convicting Mechanik on count 10 and Lill on counts 2 and 4 are affirmed for reasons stated in the panel opinion.

Judge Widener and Judge Phillips dissent. They would dismiss these counts of the indictment for the same reasons that count 1 is dismissed.

III

The jury was unable to reach a verdict with respect to Chadwick, and the district court declared a mistrial. He appealed assigning several errors, including the denial of the motion to dismiss the indictment and the denial of his motion for a judgment of acquittal on the ground of insufficient evidence. He claims that retrial will subject him to double jeopardy. The panel dismissed his appeal for lack of jurisdiction, citing United States v. Ellis, 646 F.2d 132 (4th Cir. 1981).

After the panel opinion was filed, the Supreme Court decided Richardson v. United States, 104 S. Ct. 3081 (1984). The Court held that after a mistrial was declared because of a hung jury, the defendant's contention that retrial would subject him to double jeopardy because evidence sufficient to convict had not been presented raised a colorable claim of double jeopardy appealable under 28 U.S.C. § 1291.* The Court held, however, that no valid claim of double jeopardy had been asserted because the declaration of a mistrial following a hung jury does not terminate the original jeopardy. The Court also said, 104 S. Ct. at 3086 n.6:

> It follows logically from our holding today that claims of double jeopardy such as petitioner's are no longer "colorable" double jeopardy claims which may be appealed before final judgment. A colorable claim, or course, presupposes that there is some possible validity to a claim. . . . Since no set of facts will support the assertion

---

* The Court noted that United States v. Ellis, 646 F.2d 132, 135 (4th Cir. 1981), reached a contrary conclusion. *See* 104 S. Ct. at 3083 n.4.

> of a claim of double jeopardy like petitioner's in the future, there is no possibility that a defendant's double jeopardy rights will be violated by a new trial, and there is little need to interpose the delay of appellate review before a second trial can begin.

The order denying Chadwick's motion for a judgment of acquittal and subjecting him to retrial did not terminate the original jeopardy to which he was subjected. Accordingly, as *Richardson* explains in note 6, he now has no colorable claim of double jeopardy which may be appealed before final judgment. His appeal is dismissed.

No. 80-5166 (Mechanik):
Count 1 reversed; count 10 affirmed.

No. 80-5167 (Zarintash):
Count 1 reversed.

No. 80-5168 (Lill):
Count 1 reversed; counts 2 and 4 affirmed.

No. 80-5168 (Riddle):
Count 1 reversed.

No. 80-5169 (Chadwick):
Dismissed.

WILKINSON, Circuit Judge, with whom Judge Russell, Judge Hall, Judge Chapman, and Judge Sneeden join, concurring in part and dissenting in part:

I dissent from the judgment of the court insofar as it invokes "a per se rule of invalidity" to reverse the convictions and dismiss the conspiracy count in the superseding indictment. *United States v. Mechanik*, 735 F.2d 136, 140 (4th Cir. 1984). The creation of this extraordinary remedy is not authorized by Fed.R.Crim.P. 6(d), not justified by statute or Constitution, and not consistent with the precedent of this court. Without cause or compensation, the public will now pay the price, and convicted criminal defendants will now reap the windfall benefit, of a prosecutorial mistake. This result is not right in a system of criminal justice which has become enormously complex and in which even seasoned judges and attorneys are not immune from error. Here the district court found neither bad faith on the part of the government nor prejudice to the rights of defendants. It denied the motion of defendants to dismiss the indictment because of the violation of Rule 6(d). *United States v. Lill*, 511 F.Supp. 50 (S.D. W.Va. 1980). Because I believe that the district court properly addressed and properly resolved the issue, I would affirm the convictions on all counts.

I

No one disputes that the government violated Rule 6(d) by offering the joint testimony of Agents James and Rinehart. The question is how the district court should have responded to that prosecutorial error. In confronting this problem, the first point of reference must be the rule itself:

> *Who May Be Present*: Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

As the court observes, the language is "plain and unequivocal in limiting who may appear before a grand jury." 735 F.2d at 139. Clarity of prohibition, however, does not imply a rule of reversal for any and all violations. Fed.R.Crim.P. 7(c), for example, is equally plain and unequivocal in requiring the indictment to refer specifically to statutes or regulations that the defendant is said to have infringed, but errors in the citations, or complete omission of the citations, will not support dismissal of an indictment unless the error has misled the defendant to his or her prejudice. *See* Fed.R.Crim.P. 7(c)(3). More generally, almost any proscription of prosecutorial conduct may be cast in unambigous terms. The appropriate remedy for a particular form of misconduct is determined not by the directness of expression but by the context, the purpose, and the practical workings of the standard involved.

The immediate context of Rule 6(d) is the conception of justice envisioned by the Federal Rules of Criminal Procedure. The rules operate as an efficient means to truth and a partial guarantee of integrity, without any pretension of being, in every detail, a necessary ritual of fairness. The rules are not an end in themselves. The rules live for, and through, the judgment. They deter noncompliance by requiring reversal where departure from the rules

has affected the judgment—a threat completely adequate to ensure the obedience of the participants in the trial process. Some judicial values may be compromised by an error which has not affected the judgment, but if truth and integrity are respected, acceptance of the result offsets such a compromise by advancing nobler values of decision: the innocent are freed, the guilty are named, the commitment of resources to litigation is husbanded.

Fed.R.Crim.P. 52(a) embodies this principle, stating broadly:

> *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

Binding on this court under Rule 54(a), the plain and unequivocal language of Rule 52(a) requires us to review indictments tainted by rules violations, including Rule 6(d) violations, with attention to the likelihood that the defendant has been disadvantaged by the procedural failure. *See generally United States v. Dougherty*, 473 F.2d 1113, 1127-28 (D.C. Cir. 1972). Adoption of a per se rule of invalidity, which allows for no such Rule 52(a) analysis, overlooks the axiom of interpretation that the rules should be read together as an integrated, harmonious whole. Ironically, the result is that a construction intended to compel adherence to the federal rules, 735 F.2d at 139, is in itself unfaithful to the restriction of enforceability, and the conception of justice, recognized by the rules themselves.

The same conclusion is compelled by related acts of Congress and decisions of the Supreme Court. The salient statute, 28 U.S.C. § 2111, provides that

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Originally enacted to prevent appellate courts from looming above criminal trials as "impregnable citadels of technicality," *Kotteakos v. United States*, 328 U.S. 750, 759 (1946) (citation omitted), 28 U.S.C. § 2111 echoes Fed.R.Crim.P. 52(a) in its insistence that "substantial rights" must be implicated before a conviction may be reversed. Again, that such substantial rights have been affected is determined not merely by asking whether a guarantee has been violated but by asking "what effect the error had or reasonably may be taken to have had upon the jury's decision." *Kotteakos*, 328 U.S. at 764. Toward the same end, an important line of Supreme Court cases beginning with *Chapman v. California*, 386 U.S. 18 (1967), establishes that even some constitutional norms are not so independently senstive that intrusion must always compel reversal of the subsequent judgment. In reviewing these intrusions, the appellate court will determine whether "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.* at 24 *quoting Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963).

Together the statute and the decisions refute a policy of per se dismissal based solely upon the promise and the purpose of Rule 6(d). To be sure, the rule does reflect considerations of justice in ensuring grand jury privacy and in preventing undue influence. But Fed.R.Crim.P 6(d) is no more central to due process, and no more demands acknowledg-

ment through automatic reversal, than many protections that have been subjected to harmless error analysis. *See, e.g., Chapman* (Fifth Amendment right to prosecutorial silence about defendant's failure to testify); *Coleman v. Alabama*, 399 U.S. 1, 11 (1970) (Sixth Amendment right to counsel at preliminary examination); *Chambers v. Maroney*, 399 U.S. 42, 53 (1970) (Fourth Amendment right to suppression of unlawfully seized evidence). Like these guarantees, and like the majority of procedural provisions, Rule 6(d) must be addressed in any remedial analysis through its influence on the judgment. How Rule 6(d) should somehow attain a status the Supreme Court has refused to accord non-prejudicial departures from most constitutional norms is inexplicable.

Nor is a per se response to Rule 6(d) violations suggested by the additional due process limitation of the harmless error principle to defects and consequences that are susceptible to evaluation. As Justice Harlan noted in *Chapman v. California*, the effect of some procedural errors is "so devastating or inherently indeterminate that as a matter of law they cannot reasonably be found harmless." 318 U.S. at 52 n. 7 (Harlan, J., dissenting). This rationale explains automatic reversal for errors that suffuse the proceeding, distorting the very perspective of the fact-finder, and by extension, the perspective of the reviewing court. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963) (denial of assistance of counsel at trial). In contrast, the error at issue here involved one isolated session of prosecutorial testimony. By extracting that evidence and examining the remainder of the record, a court may determine the probability that the testimony influenced the grand jury with

no more uncertainty than is inevitable in routine applications of harmless error.[1]

Alluding to the "difficult burden" upon a defendant required to show the prejudicial effect of a Rule 6(d) violation, the court appears to refine the above argument and to suggest that the effect of an error is decisively less apparent to the accused. 735 F.2d at 139. Under this theory, the limited availability of grand jury information so constricts the dependant's capacity to assess the violation as to mandate dismissal of tainted indictments. But a per se rule does nothing to lighten the truly difficult burden on the defendant—the detection of all Rule 6(d) violations.[2] The per se remedy instead addresses the burden of showing *prejudice*, a problem for which 18 U.S.C. § 3500, Fed.R.Crim.P. 6(e)(3), Rule 16(a)(1)(A), and Rule 26.2 already equip the knowing victim. Furthermore, dismissal of the indictment is too drastic a solution to this perceived disadvantage. As the district court intimated here, the complications of defendant's position can be alleviated by placing responsibility on the prosecution to demonstrate to the court the absence of prejudice, a result further sug-

---

[1] Obviously, another case might involve a Rule 6(d) violation more difficult to trace, just as another case might involve a Rule 6(d) violation that had prejudiced a defendant. The range of possibilities only emphasizes that each situation must be examined in its own context rather than on a per se basis.

[2] The district court would handle the problem of detection through its command that "in order to assure that the one-witness rule is observed in subsequent grand jury proceedings, the prosecutor will henceforth be directed routinely to advise the court with respect to each criminal case indictment whether the requirements of Rule 6(d) have been fulfilled." *United States v. Lill*, 511 F.Supp. at 61.

gested by the duty of the government to prevent Rule 6(d) violations. *See also Chapman v. California*, 386 U.S. at 24.

II

Neither Rule 6(d) nor the limitations upon the harmless error principle will support a per se rule of invalidity for indictments obtained after unauthorized parties have appeared before the grand jury. The proper response is "to identify and then neutralize the taint by tailoring relief appropriate in the circumstances." *United States v. Morrison*, 449 U.S. 361, 365 (1981). Indeed, the last time that this court reviewed an indictment on Rule 6(d) grounds, it followed precisely that approach. *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982). Noting that "each situation should be addressed on a *sui generis* basis," the court examined the nature of the violations, the length of the proceedings, the culpability of the government, and the likelihood that the defendants had suffered any prejudice through the error. *Id.* at 1184-85. Concluding that the violations had been isolated, that grand jury secrecy had been maintained, that the proceedings had been extensive, that the government had merely been negligent, and that the defendants had suffered no injury, the court declined to dismiss the contested counts of the indictment. *Id.*[3]

[3] Its invocation of a per se rule of invalidity notwithstanding, the plurality opinion attempts to adopt a measure of this *sui generis* approach in its disposition of the other counts of the indictment. Noting that "this case, involving a superseding indictment, presents a unique situation," the court affirms the convictions on the substantive counts because "there was a valid basis for the charges they set forth that was independent of the unauthorized joint appearance of the

The district court followed precisely the same approach here, anticipating *United States v. Computer Sciences Corp.* in every respect. It found that only one violation had occurred, that it had not compromised privacy interests, and that it had taken place after the grand jury had returned much of the final indictment. The court noted that the trial pursuant to the indictment had consumed three months, at enormous expense to the government and the defendants, and had reached a conclusion that was in itself unchallenged. The court had already observed, in an earlier memorandum opinion, that the government conduct revealed no evidence of bad faith and no intent to confuse or mislead the grand jury. Finally, the court conducted a comprehensive inquiry into the likelihood of prejudice and determined that any improper influence was possible only "in the sense that all things are possible." *Id.* at 61. This path of reasoning parallels that of *United States v. Computer Sciences Corp.* so closely that its rejection—in favor of a per se rule of invalidity—can only be interpreted as overruling a very recent precedent. *See United States v. Mechanik*, 735 F.2d 136, 141-42 (Hall, J., dissenting).

Distinctions between the underlying circumstances of *United States v. Computer Sciences Corp.* and the facts presented by this case do nothing to reconcile the contradiction; the method of analysis is the crucial area of conflict. Moreover, I see no reason to

---

agents." 739 F.2d at 140. This rationale, which echoes the basis of the unchallenged district court conclusion about the conspiracy count, cannot be reconciled with a per se rule. Recognizing the inconsistency, two judges concurring in the dismissal of the conspiracy count have also voted to dismiss the entire indictment.

disagree with the conclusion of the district court on this record. The comparison of testimony and the history of this particular grand jury fully support the determination that the defendants suffered no prejudice through the joint appearance of the agents. The other factors were properly weighed, and the relief granted by the court was appropriate to the situation. The wisdom of the decision below, no less than the import of authority above, and a respect for recent precedent within this court, dictates affirmance of these convictions.

III

Perhaps no aspect of this court's responsibility is more delicate than the review of criminal convictions challenged because of acknowledged procedural errors. We must identify the many changing faces of substantial right and mere technicality. We must be mindful of the complicity of the judicial system in the improper conduct. And, without meeting the jury or hearing its deliberations, we must imagine why a group of men and women chose to believe as they did. The awareness of our own limitations and the consequences of our mistakes understandably tempt us to withdraw into a sanctuary of procedure, to require every judgment to honor the rituals of rules as well as the essence of fairness. But our duty precludes that retreat. We must at least attempt to determine whether an imperfect justice remains nonetheless an act of justice. Because the decision of the court forsakes that attempt, I must, with respect, dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 80-5166 to 80-5169

UNITED STATES OF AMERICA, APPELLEE

v.

MARSHALL MECHANIK,
a/k/a MICHAEL PATRICK FLANAGAN, APPELLANT

UNITED STATES OF AMERICA, APPELLEE

v.

SHAHBAZ SHANE ZARINTASH, APPELLANT

UNITED STATES OF AMERICA, APPELLEE

v.

JEROME OTTO LILL,
STEVEN HENRY RIDDLE, APPELLANTS

UNITED STATES OF AMERICA, APPELLEE

v.

MARK DOUGLAS CHADWICK, APPELLANT

Argued Feb. 9, 1984

Decided May 16, 1984

Before WINTER, Chief Judge, HALL, Circuit Judge, and BUTZNER, Senior Circuit Judge.

BUTZNER, Senior Circuit Judge:

Steven H. Riddle, Shahbaz S. Zarintash, Jerome O. Lill, and Marshall Mechanik, convicted of drug related offenses, assign as principal error the district court's denial of their motion to dismiss the indictment because the prosecutor violated Federal Rule of Criminal Procedure 6(d).[1] Mark D. Chadwick, charged with conspiracy, appeals the district court's denial of a judgment of acquittal after the jury was unable to reach a verdict.

Because two witnesses testified simultaneously before the grand jury in violation of rule 6(d), we conclude that count 1, charging conspiracy, should have been dismissed. Counts 2, 4, and 10, charging substantive offenses, were not tainted by this impropriety and need not be dismissed.[2] We find no cause for reversal in the other assignments of error.

I

This prosecution arose out of the crash of an aircraft carrying approximately 10 tons of marijuana

---

[1] Riddle and Zarintash were convicted of conspiring to commit offenses involving marijuana (count 1). Lill was convicted of conspiracy (count 1), importing marijuana (count 2), and possession with intent to distribute marijuana (count 4). Mechanik was convicted of conspiracy (count 1) and traveling in interstate commerce to carry on an illegal business enterprise (count 10).

[2] The district court's opinion, *United States v. Lill*, 511 F.Supp. 50 (S.D. W.Va. 1980), recounts in meticulous detail all proceedings pertinent to the issue involving rule 6(d), making it unnecessary for us to advert to much of the record.

at an airport near Charleston, West Virginia. The same grand jury returned two indictments.[3] The first was returned a week after the plane crashed. There was no irregularity in the grand jury proceedings that led to the return of this indictment.

The investigation continued, and drug enforcement agents gathered additional evidence. For this reason, the prosecutor drew a superseding indictment for consideration by the grand jury. In support of the superseding indictment, the prosecutor presented two agents who were sworn and questioned together. The transcript discloses that they alternated in their testimony, occasionally supplementing each other's answers. Each was not simply a passive auditor of the other's examination. The appellants were tried on the superseding indictment.[4]

The principal difference between the indictments with respect to the appellants was count 1 charging conspiracy. The superseding indictment alleged the commission of additional overt acts by the appellants. These additional allegations were the subject of the agents' joint testimony. Counts 2, 4, and 10 were

---

[3] The district court found, 511 F.Supp. at 58-59:

> It is especially significant to note that the two indictments were returned by the same grand jury. The court's review of the attendance and voting records of that grand jury reveals that each of these indictments was returned by a unanimous vote. A nucleus of the same seventeen grand jurors voted for each indictment. In addition, one other grand juror voted for the first indictment but did not vote on the second, while two others voted for the second indictment but did not vote on the first.

[4] Other persons were also named as defendants. Some pled guilty, some were acquitted, and one is a fugitive.

identical to their counterparts in the original indictments except for immaterial changes and numbering.

Unsuccessful in obtaining grand jury transcripts before trial, the appellants were unaware of the agents' joint appearance until one of them testified at the trial. Then, pursuant to 18 U.S.C. § 3500 (Jencks Act), the prosecutor furnished a partial transcript that disclosed this incident. The district court initially denied a motion to dismiss the indictment, but later, on resubmission, it took the motion under advisement and proceeded with the trial.[5]

After the jury returned its verdict, the district court denied the motion to dismiss. It ruled that the joint appearance of the agents violated rule 6(d). It concluded, however, that the appellants had failed to show prejudice primarily because other testimony corroborated the overt acts added to the superseding indictment.

II

Rule 6(d) provides that only "[a]ttorneys for the government, the witness under examination, interpreters . . . and . . . a stenographer or operator of a recording device may be present while the grand jury is in session . . . ." The rule is designed, in part, to insure that grand jurors, sitting without the direct supervision of a judge, are not subject to undue influence that may come with the presence of an unauthorized person. *See United States v. Echols*, 542 F.2d 948, 951 (5th Cir. 1976); *United States v.*

---

[5] Judge Knapp initially denied the motion. After he became ill, Judge Copenhaver presided pursuant to Fed. R. Crim. P. 25(a).

Kazonis, 391 F.Supp. 804, 805 (D.Mass 1975), *aff'd without opinion*, 530 F.2d 962 (1st Cir. 1976).[6]

There is no doubt that, as the district court found, the simultaneous testimony of two agents constituted a violation of rule 6(d). The rule refers to "the witness" in the singular, in contrast to "[a]ttorneys for the government." This language was deliberate and consistent with traditional practice. *United States v. Carper*, 116 F.Supp. 817, 819-20 (D.D.C. 1953). Indeed, courts consistently have held that the presence of one witness during the testimony of another witness at grand jury proceedings taints an indictment. *See, e.g., United States v. Treadway*, 445 F.Supp. 959, 962 (D.D.Tex. 1978); *United States v. Bowdach*, 324 F.Supp. 123, 124 (S.D.Fla. 1971); *United States v. Edgerton*, 80 F. 374, 375 (D.Mont. 1897). The government cites no case to the contrary. Consequently, each agent was an unauthorized person at the grand jury sessions any time the other agent was testifying.

We reject the argument that defendants must show that a rule 6(d) violation prejudiced them before an

---

[6] In *Kazonis*, 391 F.Supp. at 805, the court succinctly stated the controlling precept and its reasons:

> It is an accepted principle of the criminal law that the presence of an "unauthorized person" before a grand jury voids an indictment. This is not a mindless incantation, however, and relates to two extremely pragmatic considerations:
>
> (1) that the proceedings be private,
>
> (2) that witnesses and grand jurors sitting without the protection of a presiding justice be free from the risk of intimidation attendant upon the presence of numbers of prosecution witnesses, particularly police witnesses, in the grand jury.

indictment may be dismissed. Rule 6(d) is plain and unequivocal in limiting who may appear before a grand jury. Requiring a defendant to show prejudice would impose a difficult burden that could undermine the protection that the rule provides. *Carper*, 116 F. Supp. at 820. Indeed, most federal courts considering the matter have agreed that a showing of prejudice is not necessary to dismiss an indictment because of a rule 6(d) violation. *See, e.g., Echols*, 542 F.2d at 951; *United States v. Phillips Petroleum Co.*, 435 F.Supp. 610, 618 (N.D.Okl. 1977); *United States v. Borys*, 169 F.Supp. 366, 367-68 (D. Alaska 1959).

Our decision in *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), does not depart from this line of cases. *Computer Sciences* reversed the district court's dismissal of an indictment by a grand jury that was interrupted five times. Each intrusion lasted no more than a minute or two and brought the proceedings to an abrupt halt. We held that such "technical, trivial, harmless violations of no significant duration" did not nullify the jury's work.[7] Other courts also have held that dismissal is

---

[7] Nevertheless, we added, 689 F.2d at 1186:

> We should not be understood as commending the practice here. With the exception of the maintenance man, all of the intruders were apparently under the control of the prosecutors, who were obviously not diligent in keeping the sanctity of the grand jury room inviolate. Prosecutors should not consider what we have written as in any way amounting to an encouragement to depart from scrupulous compliance with Fed. R. Crim. P. 6(d). Having been fortunate enough to survive the attack here by the skin of their teeth on the basis of the record as a whole, they cannot count with any assurance on a similar conclusion on another record involving unauthorized grand jury room intrusions.

not warranted when the grand jury proceedings were halted during brief, inadvertent intrusions of unauthorized persons. *See United States v. Kahan & Lessin Co.*, 695 F.2d 1122, 1124 (9th Cir. 1982) (citing *Computer Sciences*); *United States v. Rath*, 406 F.2d 757, 757 (6th Cir. 1969).

In this case, by contrast, the proceedings continued in the presence of an unauthorized person. The agents, alternating their testimony before the grand jury, referred to themselves as the collective "we," backed up each other in the description of incriminating evidence, and supplemented each other's presentation. This joint effort could have added to each agent's credibility and could have had an undue influence on the grand jurors' decision to return the superseding indictment, especially where both witnesses were government officials. *See United States v. Daneals*, 370 F.Supp. 1289, 1296 (W.D.N.Y. 1974); *Bowdach*, 324 F.Supp. at 124.

In sum, we conclude that the joint appearance of the agents was a violation of rule 6(d). Because the proceedings were not halted when both were in the grand jury room, the indictment is invalid. "No showing of prejudice is required to quash an indictment secured with the presence of unauthorized persons in the grand jury room." *Echols*, 542 F.2d at 951.

III

This case, involving a superseding indictment, presents a unique situation. Counts 2, 4, and 10 were returned in the initial indictment under different numbers by the same grand jury after proceedings that were properly conducted. The superseding indictment simply incorporated these counts in virtually the identical form in which they appeared in the

initial indictment. Unlike the conspiracy count, there was a valid basis for the charges they set forth that was independent of the unauthorized joint appearance of the agents. Consequently, the invocation of a per se rule of invalidity is inappropriate for counts 2, 4, and 10.

Probable cause was found for the offenses charged in counts 2, 4, and 10 by the grand jury when it returned the initial indictment, which was not tainted by a violation of rule 6(d). Incorporation of these counts in the superseding indictment did not make them any less valid. Consequently, we conclude that the district court did not err by refusing to dismiss these counts.

IV

Three other assignments of error require but brief comment. The district court did not err by admitting into evidence a ground-to-air radio that the police seized from the cab of a truck they were chasing. The police had probable cause to stop the truck and arrest its driver for several violations of traffic laws. Probable cause to arrest authorized the police to search the passenger compartment. *New York v. Belton*, 453 U.S. 454, 460, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981). Formal arrest need not have preceded the search. *Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S.Ct. 2556, 2564, 65 L.Ed.2d 633 (1980). Additionally, the search was permissible because the police had a reasonable belief based on specific facts that the occupants were dangerous. *Michigan v. Long*, —— U.S. ——, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983).

The district court properly admitted Chadwicks' postconspiracy statement to his sister and his sister's

grand jury testimony. The court properly instructed the jury that this evidence was admitted only against Chadwick. Because the statement did not specifically identify the other appellants, its admission did not violate the principles explained in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). *Cf. United States v. Seni*, 662 F.2d 277, 282 (4th Cir. 1981).

The district court's denial of Chadwick's motion for a judgment of acquittal is not an appealable order. *United States v. Ellis*, 646 F.2d 132 (4th Cir. 1981); *United States v. Carnes*, 618 F.2d 68 (9th Cir. 1980). Chadwick's reliance on the concurring opinion in *Ellis* is misplaced, for the evidence amply sufficed to warrant denial of the motion.

V

We find no merit in the appellants' other assignments of error. The conspiracy convictions of appellants Lill, Zarintash, Mechanik, and Riddle are reversed because of the violation of rule 6(d). On remand, the district court should dismiss count 1 of the superseding indictment. In all other respects, the judgment is affirmed.

No. 80-5166 (Mechanik): Count 1 reversed; count 10 affirmed.

No. 80-5167 (Zarintash): Count 1 reversed.

No. 80-5168 (Lill): Count 1 reversed; counts 2 and 4 affirmed.

No. 80-5168 (Riddle): Count 1 reversed.

No. 80-5169 (Chadwick): Appeal dismissed for lack of jurisdiction.

K.K. HALL, Circuit Judge, concurring in part and dissenting in part:

I concur in all aspects of the majority's opinion except for its holding that the violation of Federal Rule of Criminal Procedure 6(d) was of such magnitude as to compel the dismissal of appellants' convictions for conspiracy. In my view, the majority has misconstrued the applicable law in evaluating this issue. Thus, because I would affirm the conspiracy convictions, I must dissent in part.

In *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 953 (1983), this Court held that five brief intrusions by unauthorized persons during a grand jury investigation did not require dismissal of the indictment stemming from those proceedings. In reaching this conclusion, we emphasized that when evaluating alleged violations of Rule 6(d) "each situation should be addressed on a *sui generis* basis." *Id.* at 1185. Applying this rule to the facts of that case, we found that *Computer Sciences* was "a case '*absent demonstrable prejudice* or substantial threat thereof' so that 'dismissal of the indictment [was] inappropriate.'" *Ibid.* (quoting *United States v. Morrison*, 449 U.S. 361, 365, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981)) (emphasis added).[1]

In a carefully reasoned opinion, the district judge in the instant case followed the guidelines enunciated in *Computer Sciences*. Judging the case on its own peculiar facts and merits, he found that although

---

[1] The Court later reiterated this point by stating that "The case before us, in short, is one where there has been no . . . prejudice to the defendant." 689 F.2d at 1185.

a violation of Rule 6(d) had occurred when the government agents testified jointly before the grand jury, it had not been of such magnitude as to require dismissal of the indictments for conspiracy. Following this Court's lead in *Computer Sciences*, the district judge placed considerable emphasis on the question of whether appellants suffered demonstrable prejudice.[2]

Judge Copenhaver made a detailed analysis of the possible prejudicial impact of the Rule 6(d) violation on appellants' conspiracy indictments. It is true that appellants were tried on the superseding indictment and that several alterations and additions had been made in that indictment with respect to the conspiracy count. After carefully evaluating these changes, Judge Copenhaver found that each such alteration or addition was "either supported by testimony apart from the [agents] joint testimony or became moot by virtue of the acquittal of [codefendants] Kook and James Chadwick."[3] Pursuant to this analysis, he concluded that the possibility of prejudice existed only "in the sense that all things are possible," and that "the existence of actual prejudice is so utterly remote [as to] appropriately be disregarded."[4] Indeed, even on appeal appellants have been unable to advance any basis for a claim of prejudice.

The majority, citing case law from other circuits for the proposition that no showing of prejudice is required to quash an indictment in violation of Rule

---

[2] The district judge also considered relevant case law, legislative history, and policy considerations in making his decision.

[3] *United States v. Lill*, 511 F.Supp. 50, 59 (S.D. W.Va. 1980).

[4] *Id.* at 61.

6(d),[3] reverses the district judge's decision on the conspiracy count without considering any of the aforementioned factual findings. In so doing, it has, in effect, tried to establish the very *per se* rule which this Court rejected in *Computer Sciences*. The majority has ignored the guidelines enunciated in *Computer Sciences* requiring the district judge to evaluate such cases "on a *sui generis* basis." In my view, the majority is bound by *Computer Sciences* and may not rely on the case law of other circuits to reverse appellants' convictions. Such a decision is particularly undesirable here, where the part of the superseding indictment found to be bad closely tracked the charging portion of the original indictment and in no way surprised or prejudiced the defendants.

For the foregoing reasons, I would affirm appellant's conspiracy convictions as well as their convictions on the substantive counts.

---

[3] *See United States v. Echols*, 542 F.2d 948 (5th Cir. 1976); *United States v. Phillips Petroleum Co.*, 435 F.Supp. 610 (N.D. Okl. 1977); *United States v. Borys*, 169 F.Supp. 366 (D. Alaska 1959).

APPENDIX C

UNITED STATES DISTRICT COURT
S.D. WEST VIRGINIA
CHARLESTON DIVISION

Crim. A. Nos. 79-20045, 79-20056

UNITED STATES OF AMERICA

v.

JEROME OTTO LILL, MARK DOUGLAS CHADWICK, SHAHBAZ SHANE ZARINTASH, MARSHALL MECHANIK, STEVEN HENRY RIDDLE

Aug. 15, 1980

MEMORANDUM ORDER

COPENHAVER, District Judge.

This matter is before the court on the defendants' motion to dismiss by virtue of a violation of Rule 6(d) of the Federal Rules of Criminal Procedure in that two government agents appeared simultaneously and testified interchangeably as witnesses before the grand jury returning the second of two indictments in this case. This issue was reserved from prior rulings by the court.

The procedural history of defendants' motion is as follows: The first of two indictments in this case was returned on June 14, 1979. In his omnibus motion filed on July 6, 1979, defendant Zarintash, asserting the possibility of a violation of Rule 6(d), sought a list of all persons appearing before the grand jury. All defendants thereafter filed motions adopting the

various pretrial motions filed by each defendant. A second or superceding indictment was returned on August 10, 1979. Defendants then moved to have all pre-trial motions made applicable to the August 10th indictment. By order entered January 4, 1980, Judge Dennis R. Knapp denied all pre-trial motions which had not been previously ruled upon. On several occasions prior to trial defendants unsuccessfully sought disclosure of the transcripts of the grand jury testimony in connection with various pre-trial motions.

Trial of seven of the twelve named defendants commenced under the superceding indictment on February 19, 1980. On February 28, 1980, defendants received a partial transcript of the grand jury testimony of Drug Enforcement Administration Agent Jerry Rinehart pursuant to 18 U.S.C. § 3500 which revealed that Agent Rinehart testified before the grand jury simultaneously with DEA Agent Randolph James just prior to the return of the superceding indictment. The defendants thereupon moved for dismissal of the indictment on the basis of a violation of Rule 6(d). By order entered on March 14, 1980, defendants' motion to dismiss and their alternative motion to stay the trial pending appeal was denied by Judge Knapp. While the trial continued, defendants filed a Notice of Appeal and petitioned Circuit Judges James M. Sprouse on March 19, 1980, for a stay pending appeal. The stay was denied by order entered on March 25, 1980. On April 10, 1980, a panel of the United States Court of Appeals for the Fourth Circuit, consisting of Circuit Judges Hall, Phillips and Sprouse, denied defendants' petition for a writ of mandamus and for a writ of prohibition.

Thereafter, Judge Knapp was unexpectedly hospitalized. On April 28, 1980, he directed that this

action be transferred to the docket of the undersigned judge. On May 22, 1980, defendants moved for rehearing of their motion to dismiss the indictment on the ground of unauthorized appearances before the grand jury. The court took that motion under advisement while the trial continued in progress.

When the trial concluded July 3, 1980, two of the seven defendants on trial were acquitted. Of the remaining five, named in the caption above, the jury was unable to reach a verdict as to Mark Chadwick. Jerome Lill was found guilty on counts one, two and four, Marshall Mechanik was found guilty on counts one and ten, Steven Riddle was found guilty on count one, and Shahbaz was found guilty on count one, and Shahbaz Zarintash was found guilty on count one.

I.

The event giving rise to the two indictments and subsequent jury trial in this criminal action was the crash landing of a DC-6 aircraft laden with some ten tons of marijuana at the Kanawha County Airport, Charleston, West Virginia, at 12:53 a.m., on June 6, 1979. On June 12, 1979, a federal grand jury convened to investigate the crash, and on June 14, 1980, after having heard approximately thirty witnesses, the first of two indictment was returned (No. 79-20045 CH).[1] The June 14th indictment consisted of one conspiracy count and seven substantive counts and named nine defendants.[2]

---

[1] The June 14, 1980, indictment was omitted from publication at the suggestion of the court.

[2] The nine defendants are: Breck Dana Anderson, David Thomas Seesing, Jerome Otto Lill, Gregory Louis McCafferty, Mark Douglas Chadwick, Shahbaz Shane Zarintash, Marshall Mechanik, Leon Jacques Gast, and Steven Henry Riddle.

On July 31, August 2, 9 and 10, the same grand jury received further testimony regarding the June 6, 1979, DC-6 crash. On August 10, 1979, the grand jury returned a second, superceding indictment consisting of one conspiracy count and eleven substantive counts and adding three defendants (No. 79-20056).[3] The conspiracy count in the August 10th indictment was amended and expanded as set forth, *infra*, at 59-60.[4]

As noted, the trial of seven of the twelve defendants named in the August 10th indictment commenced on February 19, 1980.[5] On February 28, 1980, Agent Rinehart testified on behalf of the government, at which time the government furnished defendants with a portion of the transcript of Agent Rinehart's grand jury testimony as § 3500 material. The transcript disclosed that on August 10, 1979, Agent Rinehart was placed under oath simultaneously with fellow-DEA Agent James. The agents were sworn immediately prior to the reading of portions of the proposed superceding indictment to the grand jury by Assistant United States Attorney Hoffman. Questions were

---

[3] The three additional defendants are: James F. Chadwick, Craig Bruce McGilvray, and Russell Kook.

[4] Pursuant to the court's rulings on the government's motion to dismiss filed at the conclusion of its case in chief and defendants' motions to strike and for judgment of acquittal filed at the close of the evidence, the August 10, 1979, indictment was significantly redacted. The August 10, 1979 and the redacted indictments were omitted from publication at the suggestion of the court.

[5] Defendants Anderson, Seesing, Gast and McCafferty entered pleas of guilty prior to the commencement of the trial. Defendant McGilvray has not been found and remains at large.

then propounded to Agents Rinehart and James by United States Attorney King, Assistant United States Attorneys Hoffman and DiPiero, and by the grand jurors.

More specifically, the agents' joint testimony commenced with Agent Rinehart who testified regarding changes made in the first eight paragraphs of the conspiracy count in the proposed superceding indictment. Agent James interjected once at the conclusion of this phase of the agents' joint testimony in response to a juror's question directed to Agent Rinehart regarding the flight experience of defendants (and pilots) Anderson and Seesing:

> JUROR: You don't know how many [flight] hours or anything like that?
>
> MR. RINEHART: No.
>
> MR. JAMES: The way you would determine their hours is from their last medical. I think David Seesing was the pilot who probably had the best credentials for flying. He had ratings in addition to what Anderson had.
>
> I believe his hours of flight time were quite a bit more than Anderson's. I would have to check the records on that to make sure.
>
> But I think his records outweighed Anderson's, or his credentials.
>
> MR. HOFFMAN: Agent Rinehart, is there anything else you would like to clear up before we go into the overt acts?
>
> MR. RINEHART: Okay.
>
> MR. HOFFMAN: Let's go through the overt acts beginning with paragraph 9. The overt acts will show how it was part of the conspiracy, the charges in paragraphs 1 through 8.

(Tr. 39).

Thereafter Agents Rinehart and James generally alternated their testimony with respect to each of the overt acts alleged in paragraph nine of the proposed superceding indictment. On several occasions, Assistant United States Attorney Hoffman interjected to refer the jurors to the substantive count in the indictment which corresponded to the testimony they were about to receive from Agent Rinehart or James regarding an overt act. The following excerpt is representative of the nature of the remainder of the Rinehart/James joint testimony:

> MR. HOFFMAN: I believe, Agent Rinehart, that an analysis of the telephone tolls of the Sanderson number in Daytona Beach reveals numerous calls by and between various of the defendants charged in the indictment, is that correct?
>
> MR. RINEHART: That's correct. We have calls from the Sanderson number, where Kook and Powers reside, to several of the defendants alleged in the indictment.
>
> MR. HOFFMAN: Go ahead with (c).
>
> MR. JAMES: "On or about the 20th day of April, 1979, defendant Gregory Louis McCafferty, using the name George T. Markos, rented a Ryder rental truck in Cleveland, Ohio."
>
> As you are aware, I traveled to Cleveland, interviewed people at the Ryder Truck Rental Company's district office on Brook Park Road in Cleveland, and, in reviewing their records for trucks rented to a George T. Markos, we determined that a George T. Markos had rented trucks, or a truck, a Ryder truck, from them on April 20, 1979.

There was a rental agreement in file reflecting the rental of a truck on that date. An employee of that company who rented the truck to Mr. Markos identified a photograph which was presented in what we call a photo spread, a series of photos, identified a photo of Gregory McCafferty as being the individual who had come in and rented the truck using the name George Markos.

MR. RINEHART: If you will notice from that overt act, then you will have a time period of April 23 through April 28 where there are several telephone calls made shortly after the rental of that truck.

Overt act (e) reads, "On or about the 23rd day of April, 1979, a phone call was made from Fern Creek, Kentucky, to Daytona Beach, Florida."

MR. JAMES: There is a second rental of a truck in overt act (d) which I will cover before we get to the phone calls. . . .

(Tr. 44-46). The bulk of their testimony found Agent James relating information he had obtained respecting Ryder truck rentals and travel, as well as James Chadwick's alleged involvement, while Agent Rinehart undertook to weave this and other information into the network of telephone calls being summarized for the grand jury by Rinehart. The complete transcript of the grand jury proceedings at which Agents Rinehart and James were present jointly, apart from the reading of the indictment by the Assistant United States Attorney, is some sixty-two pages in length.

II.

Rule 6(d) of the Federal Rules of Criminal Procedure delineates who may be present before a federal grand jury:

> (d) Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

Defendants, contending that the rule has consistently been strictly construed, insist that the presence of more than one witness before the grand jury at one time constitutes an appearance by an unauthorized person in violation of the rule. This, defendants claim, requires the dismissal of the indictment. The government asserts that the simultaneous use of two witnesses was militated by the complexity of the indictment and the underlying investigation so as to enable the grand jury to hear a summary of the indictment in a logical and coherent fashion. The government therefore urges a pragmatic construction of Rule 6(d) and, in the alternative, an inquiry into whether any actual prejudice flowed from the Rinehart/James joint testimony.

The court will consider whether the Rinehart/James testimony constitutes a violation of Rule 6(d) and if so, the proper remedy for such violation.

III.

A.

Guidance in the proper construction of the phrase "witness under examination" as used in Rule 6(d)

can be found in the rule's somewhat sparse history.[6] As excerpted in *United States v. Carper*, 116 F.Supp. 817 (D.D.C. 1953), wherein three deputy marshals were present during a witness' testimony before a grand jury, the proceedings of The Institute on Federal Rules of Criminal Procedure provides the following insight into the drafter's intent:

> The minutes of the proceedings show the following discussion of Rule 6(d) by the Honorable George Z. Medalie, then Associate Judge of the New York State Court of Appeals and a member of the Supreme Court Advisory Committee:
>
> > "When I first heard of Federal criminal procedure, I found that it was the practice to try to get rid of indictments by proving that someone was in the grand jury who had no right to be there, and usually it was some deputy marshal or somebody else, some unauthorized person, and then the great to-do was how to get a person authorized. One of the ways to get a stenographer authorized in those days was to have him sworn in as Assistant United States Attorney, when he really was nothing of the kind.
> >
> > "Now, cases have come up on motions to quash because of unauthorized persons in the grand jury room, so we drew up a little list as to who is authorized. That is provided for. We say 'attorneys for the government'—the phrase 'attorney for the government' is defined and limited in Rule 27; 'the witness under examination'—no one has

---

[6] The Federal Rules of Criminal Procedure became effective on March 21, 1946.

> ever moved to dismiss on account of his presence; 'interpreters when needed.' Now, here is a little touch which we picked up because of the wide geographic distribution of the membership of our committee. We didn't say 'an interpreter.' We said 'interpreters.' [We discovered that in some of the Southwestern districts it is at times necessary to have two interpreters in the grand jury room, for example, one who knows the Indian language and Spanish, but doesn't know any English—fortunately knows the Indian language, the particular Indian dialect—and another who knows Spanish. So we said 'interpreters' instead of 'interpreter.']"

116 F.Supp. at 819-20, *citing* New York University School of Law Institute—Proceedings, VI *Federal Rules of Criminal Procedure With Notes and Institute Proceedings* at 153-54 (1946) (footnote and emphasis omitted) (bracketed material deleted in court's excerpt).

As implicity recognized in Judge Medalie's comments, the rule speaks of "witness" in the singular whereas the term "interpreters" was deliberately cast in the plural. *See also* Dession, *The New Federal Rules of Criminal Procedure: II*, 56 Yale L.J. 197, 202-03 (1947). This construction is consistent with common law practice as set forth in the treatise *History of the Criminal Law of England*:

> The grand jury sit by themselves and hear the witnesses one at a time, no one else being present except the solicitor for the prosecutor if he is admitted.

J. Stephen, 1 *History of the Criminal Law of England* at 274 (1883); *see also United States v. Carper*, 116 F.Supp. 817 (D.D.C. 1953); *People v. Minet*, 296 N.Y. 315, 73 N.E.2d 529 (1947); L. Orfield, 1 *Criminal Procedure Under the Federal Rules* § 6:73 (1966).

Case law on the question of whether two witnesses may appear simultaneously before a federal grand jury, though scant, is nearly uniform in its adherence to the common law practice. In *United States v. Edgerton*, 80 F.374 (D.Mont. 1897), the presence of an expert witness who remained in the grand jury room after his testimony and observed and questioned subsequent witnesses was held to be violative of accepted grand jury practice, therefore requiring dismissal of the indictment. Similarly, in *United States v. Bowdach*, 324 F.Supp. 123 (S.D. Fla. 1971), it was held that the presence of a witness who played audio tapes for the purpose of refreshing the memory of other witnesses constituted a violation of Rule 6(d). It has likewise been held that Rule 6(d) is violated where an attorney for the government testifies before the grand jury and then, having resumed his prosecutorial role, remains in the grand jury room in the presence of other witnesses. *See United States v. Gold*, 470 F.Supp. 1336, 1351 (N.D.Ill. 1979); *United States v. Treadway*, 445 F.Supp. 959, 962 (N.D.Tex. 1978); *contra*, however, is *United States v. Birdman*, 602 F.2d 547 (3rd Cir. 1979) (holding that the attorney's presence is authorized under Rule 6(d) as that of a "witness" on the one hand and as an "attorney for the government" on the other).

The government's position that the Rinehart/James joint testimony does not constitute a violation of Rule 6(d) is premised upon the rationale that practical

considerations such as the manner and mode in which evidence may be most effectively presented to the grand jury are relevant factors in construing the limits of the rule. The government cites the following excerpt from *United States v. Echols*, 542 F.2d 948 (5th Cir. 1976), in support of its position:

> [W]e read the rule as accommodating the practical exigency of making all relevant information available to the grand jury in a meaningful and understandable manner.

542 F.2d at 952.

In *Echols*, a Federal Bureau of Investigation agent appeared as a witness before a grand jury for the sole purpose of operating a cinematic projector. The court found the agent to be a "witness under examination" and thus an authorized person under Rule 6(d), holding that:

> Logic dictates that, when it is necessary for the grand jury to examine evidence which can only be presented through the use of complicated machinery, Rule 6(d) must encompass those persons with the requisite skills to operate such machines and to give testimony concerning their operations. To interpret this Rule otherwise would insulate from the grand jury the meaningful production of evidence.

542 F.2d at 952. This reading of the rule comports with the ever increasing functions witnesses may serve in both the grand jury and petit jury settings. The dictum relied upon by the government, however, does not support the conclusion that the rule authorizes joint testimony by two or more witnesses. At no time was the witness/projectionist in *Echols*

present simultaneously with another witness. *Echols* merely recognizes the nontestimonial functions a witness may serve when, for example, audio or visual evidence can only be presented by persons skilled in the use of audio and visual equipment.

B.

There are essentially two public policies ascribed by Rule 6(d). The first is that grand jury proceedings should be private, and to the greatest degree possible, secret. In *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958), the Court identified five justifications which underlie the need for grand jury secrecy:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

356 U.S. at 681 n.6, 78 S.Ct. at 986 n.6, *citing United States v. Rose*, 215 F.2d 617, 628-29 (3rd Cir. 1954); *see also United States v. Treadway*, *supra* at 163.

This policy is embodied in Rule 6(e) which imposes an obligation of secrecy upon all persons identified in Rule 6(d) with the traditional exception of "the witness under examination."[7] *See* New York University School of Law Institute—Proceedings, VI *Federal Rules of Criminal Procedure With Notes and Institute Proceedings* at 154-55 (1946). Rule 6(e) further provides that upon proper notice to the court, grand jury materials may be disclosed to:

> (i) an attorney for the government for use in the performance of such attorney's duty; and
>
> (ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

Fed.R.Crim.Proc. 6(e)(3)(A)(i)-(ii).

In the case at bar, grand jury materials were provided to Agents Rinehart and James under the authority of Rule 6(e)(3)(A)(ii). The obligation of secrecy imposed upon the agents with respect to the

---

[7] Rule 6(e)(2) of the Federal Rules of Criminal Procedure provides:

> General Rule of Secrecy.—A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

materials, however, did not further extend to their joint appearances as witnesses inasmuch as Rule 6(e) provides that "[n]o obligation of secrecy may be imposed upon any person except in accordance with this rule." *See* note 7, *supra*; *see also* L. Orfield, 1 *Criminal Procedure Under the Federal Rules* § 6:119 (1966).

Realistically, however, the secrecy of the grand jury proceedings was not threatened by virtue of the joint appearance in this case. Rather, concern here focuses on the second public policy implicit in Rule 6(d) which serves to guard against undue influence upon grand jury witnesses or the grand jurors:

> [W]itnesses and grand jurors sitting without the protection of a presiding justice [must] be free from the risk of intimidation attendant upon the presence of numbers of prosecution witnesses, particularly police witnesses, in the grand jury.

United States v. Kazonis, 391 F.Supp. 804, 805 (D. Mass. 1975); *see also United States v. Bowdach*, *supra* at 124. In *People v. Minet*, 296 N.Y. 315, 73 N.E.2d 529 (1947), the danger of permitting two witnesses to appear simultaneously before a grand jury was noted:

> There may have been prior expressions or conversations between the two witnesses which the one then giving testimony might well hesitate to repudiate or modify in the presence of others. . . . .
>
> Such presence might also improperly suppress as well as elicit testimony . . . .

73 N.E.2d at 532. *Cf. United States v. Virginia Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964).

In the case at bar, the joint witness approach tended to be detrimental to the grand jurors' ability to assess the credibility and personal knowledge of Agents Rinehart and James and to contrast and compare the substantive evidence elicited through their testimony. Throughout their joint testimony, the agents consistently couched their remarks in terms of "we know," "we believe" and "we inquired." In several instances, an agent referred back to and restated the other agent's prior testimony. In addition, on several occasions an assistant United States attorney elaborated on the testimony of the agents, using the collective "we." [8]

The added persuasiveness resulting from the collective presentation of the agents' testimony, though difficult to assess, would not have existed had each agent testified individually, inasmuch as they would have been unable instantly to supplement each other's testimony. In assessing whether their joint testimony was unduly persuasive, it must also be noted that they were government agents who had either been previously sworn as an agent of the grand jury or had previously testified individually before the grand jury, were privy to grand jury materials, and were in command of the entire investigation of the June 6, 1979, DC-6 plane crash. The court further observes that Agent James is Agent Rinehart's superior officer within the Charleston, West Virginia, office of the Drug Enforcement Administration. *See United States v. Bowdach*, *supra* at 124 ("The potential for undue

---

[8] While the substantive comments of the assistant United States attorney do not, standing alone, provide a basis for dismissal of the indictment, *see United States v. Bruzgo*, 373 F.2d 383 (3rd Cir. 1967), they are relevant to a full understanding of the impact of the Rinehart James joint testimony.

influence . . . is made greater by the fact that the unauthorized person . . . was a government agent who possessed personal knowledge of the evidence being presented.").

C.

It is, of course, not possible to determine with certainty whether the Rinehart/James joint appearance unduly emphasized their testimony and insulated them from the critical eye generally cast upon a witness testifying individually before a jury. While the joint testimony approach was doubtless convenient to the government, it was both improper and unnecessary. Although their sworn remarks touched upon and served to integrate the whole of the superceding indictment as presented to the grand jury, their testimony could have been presented separately without impairing the ability of the government to present its case fully, fairly and nearly as expeditiously. As earlier noted, the overt acts contained in paragraph nine of the August 10th indictment were used as a blueprint for the agents' joint testimony. The same structured approach could have been employed had each agent testified individually, thereby permitting the grand jurors to better assess the personal knowledge and credibility of the two agents. Indeed, at the time of the first indictment Agent James testified individually before the grand jury on June 14, 1979, for the stated purpose, in part, of answering any questions the jurors had about the proposed June 14th indictment. As with the joint August 10th testimony, Agent James' June 14, 1979, testimony immediately preceded the grand jury's deliberations and ultimate vote in favor of the return of the June 14th indictment.

In short, the joint witness approach utilized by the government with respect to Agents Rinehart and James served no legitimate purpose and, when contrasted with the traditional one witness method of eliciting testimony, tended to inhibit the effective valuation of the agents' testimony. The rationale for the sequestration of witnesses at trial is equally applicable in this context: "[T]o prevent the possibility of one witness shaping his testimony to match that given by the other witnesses . . . ." *United States v. Leggett*, 326 F.2d 613 (4th Cir. 1964), *cert. denied*, 377 U.S. 955, 84 S.Ct. 1633, 12 L.Ed.2d 499 (1964).

A further observation. The Advisory Committee on Criminal Rules' lone comment upon Rule 6(d) as originally enacted was that it "generally continues existing law." The court's inability to discover a single published decision in either the grand jury, civil trial or criminal trial contexts where two witnesses were permitted to testify contemporaneously is persuasive proof that the government's construction of the rule is contrary both to the rule as read on its face and to the accepted common law practice.

The court accordingly holds that the joint testimony of Agents Rinehart and James resulted in the presence of an unauthorized person before the grand jury and was, therefore, contrary to and in violation of Rule 6(d). The court turns next to consider the consequences of such a violation.

IV.

While there is a split of authority among the states as to whether the presence of an unauthorized person before a grand jury is *per se* prejudicial, thereby re-

quiring dismissal of the indictment,[9] federal decisions which have addressed the point are, in the main, uniform in adhering to the *per se* rule. *See Latham v. United States*, 226 F. 420, 424 (5th Cir. 1915); *United States, v. Treadway*, 445 F.Supp. 959, 962-63 (N.D.Tex. 1978); *United States v. Phillips Petroleum Co.*, 435 F.Supp. 610, 618 (W.D.Oka. 1977); *United States v. Braniff Airways, Inc.*, 428 F.Supp. 578, 589 (W.D.Tex. 1977); *United States v. Isaacs*, 347 F. Supp. 743, 748-49 (N.D.Ill. 1972); *United States v. Bowdach*, 324 F.Supp. 123, 124 (S.D.Fla. 1971); *United States v. Borys*, 169 F.Supp. 366, 367-68 (D. Alaska 1959); *United States v. Carper*, 116 F.Supp. 817, 820 (D.D.C. 1953); *United States v. Virginia-Carolina Chemical Co.*, 163 F. 66, 75-76 (M.D. Tenn. 1908); *United States v. Edgerton*, 80 F. 374, 375 (D.Mont. 1877); *see also United States v. Echols*, 542 F.2d 948, 951 (5th Cir. 1976), *cert. denied*, 431 U.S. 904, 97 S.Ct. 1695, 52 L.Ed.2d 387 (1977); *United States v. Fall*, 10 F.2d 648, 649 (D.C.Cir. 1925); *United States v. Gold*, 470 F.Supp. 1336, 1351 (N.D.Ill. 1979); *United States v. Daniels*, 370 F. Supp. 1289, 1296 (W.D.N.Y. 1974); *United States v. Boyle*, 338 F.Supp. 1028, 1036 (D.D.C. 1972); *United States v. Powell*, 81 F.Supp. 288, 291 (E.D.Mo. 1948); *United States v. Amazon Industrial Chemical Co.*, 55 F.2d 254, 261-62 (D.Md. 1931); *United States v. Goldman*, 28 F.2d 424, 426-31 (D.Conn. 1928); W. Whitman, *Federal Criminal Procedure* § 6.9 (1950); *but see United States v. Birdman*, 602 F.2d 547, 556-

---

[9] *Compare State v. Mauney*, 24 N.J. 571, 133 A.2d 313 (1957) (dismissal not warranted in the absence of actual prejudice), *with People v. Minet*, 296 N.Y. 315, 73 N.E.2d 529 (1947) (unauthorized person held to be a *per se* basis for dismissal).

58 (3rd Cir. 1979), *cert. denied*, 445 U.S. 906, 100 S.Ct. 1084, 63 L.Ed.2d 322 (1979); *United States v. Terry*, 39 F. 355 (N.D.Cal. 1899).

Justification for the *per se* rule is in part founded on the premise that a case-by-case analysis to determine whether the defendant was actually prejudiced would require a detailed inquiry that inevitably frustrates and undermines the secrecy of grand jury testimony. *United States v. Treadway, supra.* Of at least equal concern is the difficulty inherent in ascertaining whether actual prejudice resulted. It is said that requiring a showing of actual prejudice or a substantial likelihood of potential prejudice for the condonation of the exercise of undue influence and, further, that a standard of actual or even potential prejudice would impose upon the court a difficult burden that would outweigh the benefits to be derived. *See* Y. Kamisar, W. LaFave & J. Israel, *Modern Criminal Procedure* at 914 (4th ed. 1974). Utilization of the *per se* rule of dismissal may also fulfill in a given case the public policy of assuring fairness in the processes of justice, a policy which underlies the supervisory powers of the federal courts. *United States v. Birdman, supra* at 557, 558-60.

Yet, the instant case is markedly distinguishable from the legion of cases indiscriminately applying the *per se* rule. The violation of the one-witness requirement here occurred only in connection with the second, or superceding, indictment of August 10th under which the defendants were tried. The first indictment, then, was uninfected by the Rule 6(d) violation. It is especially significant to note that the two indictments were returned by the same grand jury. The court's review of the attendance and voting records of that grand jury reveals that each of these

indictments was returned by a unanimous vote. A nucleus of the same seventeen grand jurors voted for each indictment. In addition, one other grand juror voted for the first indictment but did not vote on the second, while two others voted for the second indictment but did not vote on the first.

Several of the counts in the two indictments are identical or virtually so. So it is that the counts of the August 10th indictment which are identical to the same counts contained in the June 14th indictment have a probable cause basis entirely independent of the testimony presented to the grand jury after the return of the first indictment. Such is the case with respect to the substantive counts of which the defendants Lill and Mechanik stand convicted. Mechanik was found guilty under the tenth count which is identical to the sixth count in the first indictment. Lill was convicted of the second and fourth counts which are identical in both indictments except for the inconsequential fact that Gregory Louis McCafferty was charged as a fourth defendant in those same counts in the first indictment but not in the superceding indictment.[10]

Thus, as to Lill and Mechanik on the substantive counts, there was neither prejudice nor potential for prejudice. Where neither is present, application of the *per se* dismissal rule is without virtue save for exemplary purposes. As will be developed, it is by no means necessary to dismiss the Lill and Mechanik substantive counts in order to assure future adherence by the prosecutor to the one-witness requirement.

---

[10] The grand jury, in so doing, simply took McCafferty off the plane where he had been charged in the first indictment along with Lill and two others and placed him instead in the second indictment as a codefendant on the ground.

The only remaining count requiring attention is the first count which, in both indictments, charges the offense of conspiracy. Defendants Lill, Mechanik, Zarintash and Riddle were found guilty on the conspiracy count, with the jury being unable to reach a verdict as to defendant Mark Chadwick. In the second indictment there were a number of alterations and additions to the conspiracy count as it had appeared in the first indictment. Each of them was the subject of the Rhinehart/James joint testimony. The alterations and additions remaining in the redacted version of the second indictment on the basis of which the case went to the jury are set forth below. In each instance the alteration and addition was either supported by testimony apart from the Rinehart/James joint testimony or became moot by virtue of the acquittal of Kook and James Chadwick:

> Addition of two defendants, James Chadwick and Russell Kook. (Both acquitted.)[11]
>
> Alteration of the origination point of the flight as being San Marcos in Columbia, South America, instead of San Marcos, Guatemala. (Supported in part by Rebecca Markos' testimony.)
>
> Alteration of McCafferty's placement so as to allege that he was waiting at the airport, after having traveled in interstate commerce, to meet the DC-6 plane and receive its contraband cargo on the morning of June 6, 1979, instead of being placed on the plane. (Supported by Agent James' earlier solo testimony of August 2, 1979.)[12]

---

[11] A third added defendant, McGilvray, is a fugitive who was not tried and remains at large. For failure of proof, he was struck from the redacted version of the second indictment.

[12] At the conclusion of Agent James' solo testimony of August 2, 1979, Assistant United States Attorney Hoffman

Addition of James Chadwick as one who along with Mark Chadwick as originally charged, was also named as providing a safe place for the DC-6 to land. (James Chadwick acquitted.)

Addition of Mark Chadwick and James Chadwick as providing a safe place for the cargo of the DC-6 to be unloaded and a safe departure from the airport for the defendants and coconspirators. (James Chadwick acquitted. Testimony in connection with the conspiracy count of the first indictment, which charged Mark Chadwick with providing a safe place for the DC-6 to land, was sufficient to support the inclusion of a charge against him of providing as well a safe place for unloading the cargo and safe departure for the defendants and coconspirators. Moreover, count one of the first indictment had specifically charged that Mark Chadwick aided the flight of certain of the defendants after the DC-6 crash.)

---

cautioned the grand jury that they should not consider James' testimony on that occasion, at least to the extent given in summary form, as evidence that "would go toward probable cause of anybody else's involvement in these facts" (Court *In Camera* Ex. 42 DD, p. 9). It is observed that James' solo testimony which serves to place McCafferty on the ground rather than on the plane, as well as his testimony on the same occasion with respect to the Ryder truck rentals and travel from Cleveland which were added as overt acts, was not presented in summary form nor did it constitute a showing of probable cause of the involvement of others not named as defendants to the first indictment. Consequently, while acknowledging that the scope of the Assistant United States Attorney's disclaimer is not free from doubt, the court chooses to treat the James solo testimony just noted as evidence for consideration by the grand jury. It is further noted that each of the overt acts relating to Ryder truck rentals were proved at trial beyond any doubt.

Addition of seven overt acts alleging rental of Ryder trucks, namely, two in Charleston, West Virginia, by defendant Mechanik and five in Cleveland, Ohio, by defendant McCafferty. (Marsha Miller's testimony supported the Ryder rentals in Charleston on April 21 and 28, 1979, appearing as overt acts d and k. Agent James in his solo testimony of August 2, 1979, established the first two McCafferty rentals in Cleveland as having occurred at the same time as the two rentals just noted in Charleston, being spelled out in overt acts c and l as April 20 and April 28, 1979. Rebecca Markos tended to support the third Ryder rental in Cleveland by McCafferty, which occurred as set forth in overt act q on May 5, 1979, by her testimony that she had seen McCafferty in a Ryder truck in early May 1979. The James solo testimony of August 2, 1979, also supported the June 3, 1979, rental by McCafferty in Cleveland as set forth in overt act y, as well as the exchange for the larger truck on June 5, 1979, as charged in overt act cc, which is also supported by the Rebecca Markos testimony.)[13]

Addition of two overt acts, dd and ff, alleging interstate travel to West Virginia. (Both James' solo testimony of August 2, 1979, and Rebecca Markos' testimony support overt act ff charging travel from Cleveland on June 5, 1979.[14] William Clippard's testimony supporting the Spartanburg, South Carolina, rental by Mechanik on June 4, 1979, coupled with the White family

---

[13] *Id.* n. 12, at 59.

[14] *Id.* n. 12, at 59.

testimony, serves to substantiate overt act dd of the same date charging travel from Spartanburg.)

Addition of overt act ii respecting James Chadwick's arrival at the jail at about 12:15 a.m. on June 6, 1979 (Supported by testimony of Kanawha County deputy sheriffs. Sergeant Larry Mullins and Corporal John Meadows. (James Chadwick acquitted.)

Addition of overt act gg respecting defendant Kook as having registered at a Ripley, West Virginia, motel on June 5, 1979 (Kook acquitted.)

Other alterations and additions to the indictment for which the joint testimony of Agents Rinehart and James was responsible were either stricken on motion at trial or resulted in acquittal. Their testimony was the basis for adding Russell Kook not only as a defendant charged with conspiracy in count one but also with a substantive offense in the seventh count. As noted, Kook was acquitted. The Rinehart/James testimony served to summarize the telephone toll records subpoenaed by the grand jury and resulted in adding to the conspiracy count the allegation, later stricken by the court at the close of the evidence, that the defendants, as one of four objects of the conspiracy specified in count one, conspired to unlawfully use a telephone communication facility in violation of 21 U.S.C. § 843(b).[15] Also stricken

[15] The alleged unlawful use of a telephone communication facility was inserted in the second indictment, taking the place of the charge of obstruction of justice as one of the four objects of the conspiracy. Remaining unchanged were the other three alleged objects of the conspiracy, consisting of unlawful possession with intent to distribute a controlled substance, interstate travel with intent to promote an unlawful activity and importation of a controlled substance.

were the twenty-one overt acts involving the telephone network alleged to exist between the defendants.

Insofar, then, as the joint testimony of Agents Rinehart and James ultimately proved to be material, the grand jury also had before it ample independent evidence to support a probable cause finding of the charges as contained in the redacted version of the conspiracy count on which the case went to the trial jury, except as to defendant Kook and possibly defendant James Chadwick who were, of course, acquitted. Although the grand jury would, in my view, undoubtedly have returned the very same second indictment even had Agents Rinehart and James testified separately, it must again be acknowledged that a potential for prejudice by virtue of their joint testimony did exist. And, in the sense that all things are possible, even actual prejudice is conceivable. Yet, the existence of actual prejudice as to the conspiracy count is so utterly remote and the absence of actual prejudice as to the Lill and Mechanik substantive counts is so plain that a mere possibility of prejudice can appropriately be disregarded.

If the issue on which the court now passes were being squarely faced prior to trial, dismissal might well be decreed as the proper and prudent course. Pretrial dismissal would serve the salutary disciplinary function of underscoring the care which the prosecutor must observe in meeting the requirements of Rule 6(d) without, as in this case, conferring a windfall benefit on four defendants who stand convicted after a three-month trial conducted at enormous expense to the United States and the defendants.

Indeed, a review of the numerous district court cases cited *supra*, at 57-58, as adopting the *per se*

dismissal rule discloses without exception that dismissal was ordered before trial.[16] The two remaining cases, which dealt with dismissal after trial, consist of the Fifth Circuit case of *Latham v. United States*, 226 F. 420 (5th Cir. 1915), in which the *per se* dismissal rule was applied, and the Third Circuit case of *United States v. Birdman*, 602 F.2d 547 (3rd Cir. 1979), *cert. denied*, 445 U.S. 906, 100 S.Ct. 1084, 63 L.Ed.2d 322 (1979), in which the *per se* rule was avoided. Interestingly, even in the *Latham* case the utilization of the *per se* dismissal rule was of little moment inasmuch as the trial court conviction was also being reversed because of prosecutorial misconduct.

Rule 6(d) does not prescribe the sanction to be imposed for its violation. The rulemakers have wisely left to the courts the responsibility of fashioning sanctions appropraite to the circumstances. In this case it is sufficient that action be taken to guard against the future violation of the one-witness requirement. In order to assure that the one-witness rule is observed in subsequent grand jury proceedings, the prosecutor will henceforth be directed routinely to advise the court with respect to each criminal case indictment whether the requirements of Rule 6(d) have been fulfilled. It is observed that the court will be in a position to monitor the accuracy of the reporting process not only through Title 18, United States Code, § 3500 disclosure, but also by virtue of the increasing frequency with which the court is

---

[16] The court notes parenthetically that in several of the cases cited *supra* at 37-38, the question of dismissal was not reached, *see e.g., United States v. Isaacs, supra*, or dismissal was ordered for more than one reason, *see, e.g., United States v. Braniff Airways, Inc., supra.*

called upon to review grand jury material for various *in camera* purposes.

V.

It is accordingly ORDERED that the motions of the defendants to dismiss the indictment by reason of the Rule 6(d) violation be, and the same are hereby, denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-5166

UNITED STATES OF AMERICA, APPELLEE

v.

MARSHALL MECHINIK, a/k/a
MICHAEL PATRICK FLANAGAN, APPELLANT

No. 80-5167

UNITED STATES OF AMERICA, APPELLEE

v.

SHAHBAZ SHANE ZARINTASH, APPELLANT

No. 80-5168

UNITED STATES OF AMERICA, APPELLEE

v.

JEROME OTTO LILL, STEVEN HENRY RIDDLE,
APPELLANTS

No. 80-5169

UNITED STATES OF AMERICA, APPELLEE

v.

MARK DOUGLAS CHADWICK, APPELLANT

[Filed July 24, 1984]

ORDER

Upon consideration of the government's motion for leave to file petition for rehearing and rehearing in banc out of time, the government's petition for rehearing and rehearing in banc, appellant Mechanik's motion to recall and stay mandate and appellant Lill's motion to join in motion to recall and stay mandate.

IT IS ORDERED that the motions filed by Mechanik and Lill to recall and stay the mandate are denied. Appellants are directed to respond to the government's petition for rehearing and suggestion for rehearing in banc on or before *August 3, 1984* in the office of the clerk.

Entered at the direction of Judge Butzner for a panel consisting of Chief Judge Winter, Judge Hall, and Judge Butzner.

For the Court,

/s/ JOHN M. GREACEN
Clerk